U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 01Nov2002

CASE NUMBER: 2002-LHC-16

OWCP NO.: 06-185263

IN THE MATTER OF

JOHNNIE E. ROGERS, JR.,
Claimant

v.

ALBATROSS MARITIME,
Employer

APPEARANCES:

Thomas Glidewell, Esq.
On behalf of Claimant

Joseph O. Kulalowski, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, brought by Johnnie E. Rogers, Jr. (Claimant) against Albatross Maritime. (Employer). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on May 13, 2002, and September 19, 2002, in Mobile, Alabama.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced eight exhibits, which were admitted, including: medical records from

Springhill Memorial Hospital and West Mobile Orthopedic Center; medical bills from DePuy OrthoTech, Springhill Memorial Hospital, dj Orthopedics, Walgreens Pharmacy, Rite Aid Pharmacy, and Alabama Orthopaedic Clinic.[1] Employer did not introduce any exhibits

At the May 13, 2002 hearing the parties agreed to settle this case. Subsequently, a Section 8(i) settlement agreement was created by the attorneys but Claimant refused to sign the document. The settlement agreement provided that Claimant suffered a sprained right wrist /contusion to the right wrist as a result of a workplace accident. The parties agreed that $1500.00 was sufficient to settle any and all claims against the Employer including wage and medical benefits. After Claimant refused to enter into the settlement, the case was place back on the hearing docket, and a second formal hearing was held September 19, 2002, in Mobile, Alabama. No post-hearing briefs were filed by the parties. Based on the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STATEMENT OF THE CASE

A. Chronology

In the summer of 1976, Claimant suffered a gunshot injury to his right wrist. (Tr. 8). After some initial treatment, Claimant testified that he did not suffer any residual pain or seek medical treatment during the intervening twenty-four years prior to his workplace accident. (Tr. II, p. 26). Claimant owned and operated his own concrete statuary business making concrete bird baths, fountains and flower pots. (Tr. 80-81). Claimant's shop rent was only $200.00 per month, but he was often in arrears, and between his house and shop he may have owed as much as $3,000.00 in back rents when he filed his claim for compensation. (Tr. II, p. 31-32).

In early May 2000, Claimant helped Mr. Black, the sole proprietor of Albatross Maritime, load an out-board motor on the back of a boat. (Tr. 70-71). Recognizing Claimant's strength, Mr. Black decided that Claimant would make a good rope-man for tying and untying ships. (Tr. 70-71). After two short jobs in mid May 2000, for which Claimant was paid thirty dollars each time, Claimant participated in moving a third ship on May 31, 2000. (Tr. 4). For his work on that day, Claimant was paid $100.00. (Tr. 4).

In the course and scope of his employment on May 31, 2000, Claimant was participating in removing a boom from the water that was attached by a line to a metal shed. (Tr. 18). After the boom became caught in tension between the current and a boat, the line attached to the shed pulled the building from its platform, it toppled toward Claimant, and he jumped in the water to get out of the way, hurting his right hand in the process. (Tr. 18, 74-75). Claimant did not think his injury

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[1] References to the transcript and exhibits are as follows: Trial transcript from May 13, 2002 - Tr.__; Trial transcript from September 19, 2002 - Tr. II, p. __; Claimant's exhibits- CX-__, p.__; Employer exhibits- EX-__, p.__; Administrative Law Judge exhibits- ALJX-__; p.___.

was serious and downplayed its extent when asked if he was okay. (Tr. 76).

Without informing Employer, Claimant reported to Springhill Memorial Hospital on June 2, 2000, complaining of injuries to his right knee cap, right hand, and right wrist. (CX 1, p. 2). An x-ray of the right wrist and knee returned normal results. *Id*. at 3, 5. Dr. Jorge Alsip applied a thumb spica splint to Claimant right wrist, and referred Claimant to an orthopedist, Dr. Crotwell. *Id*.

Claimant presented to Alabama Orthopedic Clinics, P.C., to see Dr. Crotwell on June 6, 2000, regarding right hand pain and a x-ray revealed a bullet fragment in his right wrist and a questionable area in the radial styloid. (CX 2, p. 2-3). Dr. Crotwell's assessment was a contusion to the right wrist, he fitted Claimant with a wrist splint, and assigned light duty work restrictions of no lifting over two or three pounds, and no twisting or torquing of the right hand. *Id*. at 3. Due to Claimant's continued reports of pain, Dr. Crotwell upgraded his assessment to a severe contusion but stated that Claimant could return to heavy work at the docks by July 24, 2000. *Id*. at 4. Meanwhile, Mr. Black had called Claimant to perform another job, but Claimant stated that he could not because he was under a doctor's care for his hand. (Tr. 88). On July 19, 2000, claimant spoke with Mr. Black stating that he needed medical treatment from his insurance carrier as a result of the injury he sustained on May 31, 2000. (Tr. II, p. 48).

Claimant returned to heavy work, (not with Employer) but Claimant continued to report pain. (CX 2, p. 5). Further x-rays, however, were unremarkable, and Dr. Crotwell released Claimant to return to full duty again on August 31, 2000. (CX 2, p. 5). Because Claimant continued to experience pain, Dr. Crotwell ordered an MRI which revealed that Claimant had bone bruising as a result of his injury that was the source of his continued pain. *Id*. at 7. Dr. Crotwell assigned Claimant light duty, and monitored Claimant's progress, noting on December 7, 2000, that Claimant reported less pain. A February 5, MRI was unremarkable except for some arthritic conditions and Dr. Crotwell released Claimant form his care. *Id*. at 8-10.

On October 23, 2001, Claimant returned to see Dr. Crotwell complaining of progressive pain in his wrist. (CX 2, p. 11). Dr. Crotwell noted some tenderness, and opined that Claimant was suffering from severe arthritis and tennis elbow. *Id*. An x-ray of Claimant's wrist showed severe arthritis, which Dr. Crotwell opined was due to claimant's previous contusion. *Id*. On November 13, 2001, Claimant's tennis elbow was fifty percent resolved, and because Claimant's wrist was still hurting, Dr. Crotwell fitted him with another splint to wear at work. *Id*. at 12. Dr. Crotwell's impression was post tennis elbow and arthritis of the hand secondary to a severe contusion. *Id*. By December 13, 2001, Claimant was performing a lot of heavy work, and Dr. Crotwell released him again to come back only an a per needed basis. *Id*.

B. Claimant's Testimony

Claimant testified concerning his prior work for Employer, his injury and subsequent course of treatment. Prior to working for Employer, and subsequent to his injury, Claimant was engaged in self-employment in a concrete business where he constructed bird baths and garden ornaments.

(Tr. 80-81). Claimant had performed this work for approximately eight years prior to his accident and had never experienced any significant problems. (Tr. 80-81).

On at least two other times before May 31, 2000, Claimant worked as a rope man to tie down ships for Employer. (Tr. 70). Claimant testified that he was paid thirty dollars an hour for his work with Employer and the night of his injury, Claimant was paid one-hundred dollars. (Tr. 78). Including the night of his injury, Claimant only worked for Employer three times and it normally took two hours to complete a job, and sometimes three hours. (Tr. II, p. 17). On his third day of employment, Claimant testified that he was pulling a boom from the water that was attached to a metal shed and the current was so strong that the metal shed it was attached to toppled. (Tr. 73). Claimant testified:

> So I made attempts to try and get out of the way. From the size of it, I didn't think I could jump to the side, either side. I only had one way to go. We was already at the edge of the water. So I attempted to try to run forward to get out of the way, but it was so much debris in the water I couldn't get very far.
>
> So then I just dived. And when I dived I fell in the water. . . . I was afraid. I didn't know if this was the end, so I begin to look around and I hear Aubry Roney - - you know, scream - - not necessarily screaming, but asking was everybody all right.
>
> And I may have said all right, because I was laying in the water you know, looking around. But when it was time for me to get up, he was approaching me and I was - - this hand, my right hand, I reached out for help for him to help me get out of the water.
>
> And when he grabbed my hand, that's when I knew something was wrong. I mean, that's when I felt the pain right then in my hand, and I screamed, told him, No, don't help with this hand. You know, try to help me with this one to help me get my body up . . . .

(Tr. 74-75).

After getting out of the water, Claimant attempted to help pull the boom to shore with his good hand but was ineffective. (Tr. 75). Claimant also participated in setting the shed back on the bank of the river. (Tr. 75-76). Climbing up the side of the pier to catch a boat to Employer's river office, Claimant "realized again" that he hand was hurting. (Tr. 76). Rehashing events in the boat, Claimant related that his hand felt "a little funny" but Claimant thought he had just fell on his hand and was not willing to make a big deal out of the injury. (Tr. 76). At the office Claimant waited in his truck to get paid and his hand began to hurt worse. (Tr. 77). Mr. Black came by to check on Claimant and, thinking that he only had a little injury, Claimant downplayed the injury so that Mr. Black was under the impression that it was nothing to be concerned about. (Tr. 77-78).

The following day Claimant's wrist began to swell until it looked disfigured. (Tr. 82). Two days following his accident, Claimant decided to go to Springhill Memorial hospital to have his wrist checked out and he gave the hospital his private insurance information. (Tr. 83). Personnel at the hospital referred Claimant to an orthopaedist, Dr. Crotwell. (Tr. 84).

Claimant related that he had suffered a prior wrist injury in 1976 when Claimant received a gunshot injury in his hand that required medical treatment. (Tr. 79-80). Claimant related, however, that he suffered no lingering pain or impairment after that date and had never sought further medical treatment since receiving the injury in Vietnam. (Tr. II, p. 26). After the accident however, Claimant related that he was not able to resume work in his concrete shop. (Tr. II, p. 30). Claimant had not sought any treatment from Dr. Crotwell in 2002 other than to have his prescription medication filled. (Tr. II, p. 20).

About two weeks after the accident, Employer called Claimant to see if Claimant wanted more work. (Tr. 88). Claimant related that he would like to work but he was still under Dr. Crotwell's care for his hand. (Tr. 88). Employer only related that he hoped Claimant's hand got better. (Tr. 89). Clamant never returned to work for Employer after suffering his workplace accident. (Tr. II, p. 18). Claimant's injury did not keep him from going to his concrete statuary shop to "look around." (Tr. 90).

Claimant testified that he still has problems with his wrist because it periodically swelled, but it was not bad enough to prohibit him from making a living. (Tr. II, p. 16). As of September 13, 2002, Claimant related that he continued to work in his shop and was no longer seeking medical treatment. (Tr. II, p. 16-17). Prescription medication helped to reduce his pain, but Claimant testified that he was not able to function at his best because it altered his mind. (Tr. II, p. 21).

Claimant testified that he paid $200.00 per month in rent for the location of his concrete business, that he often fell behind, and he sometimes performed maintenance functions to make up arrears. (Tr. II, p. 23). Claimant also paid rent for his home, but he could not remember if he was in arrears during the summer of 2000. (Tr. II, p. 24). Claimant acknowledged that he could have been as much as $3,000.00 in arrears when he decided to file a claim for compensation. (Tr. II, p. 31-32).

C. Testimony of Aubrey Lynn Roney

Mr. Roney was employed by Carl Black on May 31, 2000, as a line handler supervising a crew in which Claimant was a member. (Tr. 13-14). On the evening of May 31, 2000, Mr. Roney was directing his crew to untie an oil ship. (Tr. 15). The job would usually last about one hour and Mr. Roney was paid "$40 an hour or $40 a ship" unless it was a "shift," and then he was paid sixty dollars. (Tr. 15). A "shift" meant that Mr. Roney would untie a ship, wait for it to move, and then tie it back again. (Tr. 16). Unaware of how much those in his crew were paid, Mr. Roney related that his rate of pay was flat, and it did not matter whether it took ten minutes or five hours to tie or untie a ship. (Tr. 16). In describing the accident, Mr. Roney related:

> We untied the ship and we had gotten to where we were having to deal with these booms to detain oil. We would pull them out or bring them in. We were - - the ship had departed. We had - - was going to bring the booms in. The tide had got the boom and had it against a bank.
>
> And we were trying to manhandle the boom back onto land, and we couldn't do it. So Mr. Black got his boat and pulled it out and the tide got it, and it pulled over a shed that wasn't tied to the thing. And it - - I pushed one man out of the way.
>
> The other man, the boom caught him and it throwed him - - it caught the back on my tennis shoes and cut the back of my tennis shoe off, and Mr. Rogers got throwed down. Or he didn't really get throwed. He was trying just to get away from it, and it was rolling down, and he just fell back like that, and it hit a metal thing and stopped.

(Tr. 18).

The boom line was attached to a stout metal shed that began to tumble towards Claimant but just before hitting Claimant it stopped on protruding metal. (Tr. 18-21). Mr. Roney went to check on Claimant and related that Claimant appeared to be in "shock." (Tr. 21). Claimant then related to Mr. Roney that he thought that he was hurt and Claimant did not continue to work. (Tr. 21-22). Because the job was over, the crew headed back to Mr. Black's office. (Tr. 23-24). Mr. Roney then related to Mr. Black that Clamant might have been injured. (Tr. 24). Employer had no notices hanging at its office detailing reporting procedures in the event of a accident. (Tr. 32).

About a year later, Mr. Roney stated that Employer's attorney came to him with a statement, which he signed. (Tr. 28). Mr. Roney testified, however, that all the assertions in the statement were not correct. (Tr. 28). Specifically, Mr. Roney never stated that he thought Claimant was about to fake an injury for money, and Claimant never related that he was not injured after his accident. (Tr. 36-37).

Mr. Roney also related that Claimant rented an apartment from his grandmother and Claimant was often late with the rent. (Tr. 34-35). Following the May 31, 2000, accident, Mr. Roney saw Claimant once or twice a week and stated that he saw Claimant making concrete statutes, and fixing "yard stuff" for money. (Tr. 30-31).

D. Testimony of Carl Black

Mr. Black, sole proprietor of Albatross Maritime, testified that after the workplace accident on May 30, 2000, he and Mr. Roney repeatedly asked if everybody was okay or if anyone was injured. (Tr. II, p. 36). Before Mr. Black gave Claimant his paycheck, he specifically asked him if he was okay, and Claimant responded that he was. (Tr. II, p. 36). Mr. Black called Claimant on several occasions following the accident, but Claimant did not return his calls, and on the one

occasion Mr. Black did speak to Claimant , he was unaware that Claimant was injured or looking for compensation. (Tr. II, p. 36).

After a period of time elapsed, Claimant called Mr. Black pleading for money, stating that he was "in a bad kind of way." (Tr. II, p. 36). Claimant still did not related that he had been to the doctor or sought medical treatment. (Tr. II, p. 36). Out of charity, Mr. Black offered Claimant $250.00 and did not attach any strings. (Tr. II, p. 39). Later that day, which Mr. Black approximated to be July 19, 2000, Claimant called back and notified Mr. Black that he was hurt and needed medical care from Mr. Black's insurance carrier. (Tr. II, p. 48). Sometime afterwards, Claimant attorney contacted Mr. Black to try and settle Claimant case. (Tr. II, p. 37). At the time of Claimant's injury, Mr. Black only had a general liability policy that did not cover Longshore claims. (Tr. II, p. 38, 47).

Mr. Black testified that he did not employ persons such as Claimant to move ships very often because it was not a frequent occurrence in his business. (Tr. II, p. 41). On a slow month he moved three ships, and on a busy month he moved as many as ten. (Tr. II, p. 41). In the year prior to Claimant's injury, Mr. Black approximated that he moved an average of five to six ships a month. (Tr. II, p. 41). Mr. Black related that he paid his employees $7.25 an hour with a guarantee that the employee would be paid for at least four hours. (Tr. II, p. 43). For a long time employee, Mr. Black would pay ten dollars an hour with a four hour guarantee. (Tr. II, p. 43). The majority of the ships Mr. Black moved only required two person, and Mr. Black performed a lot of the work so he only needed to pay one additional employee. (Tr. II, p. 44). The maximum amount an entry level employee could make a month was $360.00 if he were called to both tie and untie a ship. (Tr. II, p. 44-45).

E. Testimony of Antonio Mauricio

Mr. Mauricio worked for Employer for the past three to four years, and he testified that the amount of monthly work varied so that he would move between three and five ships a month. (Tr. II, p. 58). Mr. Mauricio testified that he was on the boat pulling the boom with Mr. Black when the metal shed toppled over. (Tr. II, p. 51). Mr. Mauricio and Mr. Black checked everybody out after the accident to make sure no one was hurt, and everybody related that they were fine. (Tr. II, p. 52). Mr. Mauricio could not recall if Claimant had difficulty climbing in or out of the boat for the trip back to Mr. Black's office. (Tr. II, p. 53-54). Mr. Black had two boats to ferry the crew and Mr. Mauricio did not recall if Claimant was onboard his boat. (Tr. II, p. 56).

F. Exhibits

(1) Medical Records from Springhill Memorial Hospital

Claimant reported to Springhill Memorial Hospital on June 2, 2000 complaining of injuries to his right knee cap, right hand, and right wrist. (CX 1, p. 2). An x-ray of the right wrist and knee returned normal results. *Id*. at 3, 5. Dr. Jorge Alsip applied a thumb spica splint to Claimant right

wrist, and referred Claimant to an orthopedist, Dr. Crotwell. *Id*. at 3.

(2) Medical Records of Dr. Crotwell

Claimant presented to Alabama Orthopedic Clinics, P.C., to see Dr. Crotwell on June 6, 2000, regarding a right hand injury incurred through a fall on May 31, 2000, at the Alabama State Docks. (CX 2, p. 2). Claimant told Dr. Crotwell that he suffered pain around his thumb, and Dr. Crotwell noticed some swelling, but the pain was not radiating. *Id*. at 3. An x-ray revealed a bullet fragment in his right wrist and a questionable area in the radial styloid. *Id*. Dr. Crotwell's assessment was a contusion to the right wrist, he fitted Claimant with a wrist splint, and assigned light duty work restrictions of no lifting over two or three pounds, and no twisting or torquing of the right hand. *Id*. at 3.

Claimant returned on June 16, 2000, and related that his wrist was better, he was not in constant pain, but he was still having pain on motion. (CX 2, p. 4). Upgrading his impression to a severe contusion, Dr. Crotwell did not release Claimant to return to work. *Id*. On July 11, 2000, Claimant related that he was seventy-five percent improved with only a little pain at the base of his thumb. *Id*. Dr. Crotwell did not want Claimant to resume any heavy work at the docks until July 24, 2000, and he counseled Claimant on how to wean himself from his wrist brace over the next week. *Id*.

On August 8, 2000, Dr. Crotwell noted that Claimant had returned to heavy work at the docks on July 24, and Claimant had a full range of motion, but still had some pain at the base of his wrist. (CX 2, p. 5). Dr. Crotwell took another set of x-rays that were unremarkable apart from some arthritic changes. *Id*. Because Claimant was still experiencing pain, Dr. Crotwell prescribed three more weeks of medication. *Id*. On August 31, 2000, Dr. Crotwell released Claimant from his care, but soon after, Claimant called requesting an MRI of his wrist because he was continuing to experience pain. *Id*.

Radiologist Dr. Sateriale performed the MRI on October 6, 2000 finding evidence of a bone contusion that should be watched for development of avascular necrosis, and he determined that the MRI contained evidence of mild or early osteoarthritis at the 1st and 5th carpal-metacarpal articulations. (CX 2, p. 6). Reviewing the results of the MRI, Dr. Crotwell opined that in addition to a contusion, Claimant had bone bruising of the trapezium and he restricted Claimant to light duty with instruction not to work with his wrist. *Id*. at 7. On December 7, 2000, Claimant returned complaining of less pain and a review of x-rays did not reveal any avascular necrosis. *Id*. On February 1, 2001, Dr. Crotwell did not detect any avascular necrosis, but scheduled a repeat MRI for February 5, 2001. *Id*. at 8-9. The MRI revealed a resolving contusion and osteoarthritis without any change from the MRI taken in October 2000. *Id*. at 9. Dr. Crotwell's plan was merely to keep Claimant on his medications, keep him on light duty, and Claimant was to return only on a per needed basis. *Id*. at 10. Most of Claimant's problem stemmed from arthritis. *Id*.

On October 23, 2001, Claimant returned to see Dr. Crotwell complaining of progressive pain in his wrist. (CX 2, p. 11). Dr. Crotwell noted some tenderness, and opined that Claimant was

suffering from severe arthritis and tennis elbow. *Id*. An x-ray of Claimant's wrist showed severe arthritis, which Dr. Crotwell opined was due to claimant's previous contusion. *Id*. On November 13, 2001, Claimant's tennis elbow was fifty percent resolved, and because Claimant's wrist was still hurting, Dr. Crotwell fitted him with another splint to wear at work. *Id*. at 12. Dr. Crotwell's impression was post tennis elbow and arthritis of the hand secondary to a severe contusion. *Id*. By December 13, 2001, Claimant was performing a lot of heavy work, and Dr. Crotwell released him again to come back only an a per needed basis. *Id*.

Claimant's Medical Bills

Claimant submitted the following medical bills paid for medical treatment:

DePuy Orthotech	$40.00
Springhill Memorial Hospital	$439.30 (paid by private insurance)
dj Orthopedics, L.L.C.	$49.00
Walgreens Pharmacy	$10.00
Rite Aid Pharmacy (PA)	$268.28 ($203.28 paid by private insurance)
Rite Aid Pharmacy (AB)	$768.79 ($518.02 paid by private insurance)
Alabama Orthopaedic Clinics, P.C.	$3,156.00 ($2,916.00 paid by private insurance)

(CX 3-8).

IV. DISCUSSION

A. Notice

Under 33 U.S.C. § 912(a) (2002), notice of an injury must be given by within thirty days after the injury, or, within thirty days of when the employee should have been aware of a relationship between the injury and the employment. Ordinarily, the date on which a claimant was told by a doctor that he had a work-related injury is the controlling date establishing awareness, and a claimant is required in the exercise of reasonable diligence to seek a professional diagnosis only when he has reason to believe that his condition would, or might, reduce his wage-earning capacity. *Osmundsen v. Todd Pacific Shipyard*, 755 F.2d 730, 732-33 (9th Cir. 1985), *on remand*, 18 BRBS 112, 114 (1986); *Lindsay v. Bethlehem Steel Corp.*, 18 BRBS 20, 22-23 (1986). The relevant inquiry is the date of awareness of the relationship among the injury, employment, and disability. *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 585 (1st Cir. 1979); *Thorud v. Brady-Hamilton Stevedore Co.*, 18 BRBS 232, 235 (1986).

The notice requirement serves to alert an employer of an impending suit, protect against fraudulent claims, and encourage prompt investigation. *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 691-92 (9th Cir. 1997). *See also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 613, 102 S. Ct. 1312, 1216-17, 71 L. Ed. 495 (1982) (stating that the notice requirement serves to appraise the employer of the allegations and helps to confine the issues to be

tried and litigated). Under Section 12(d) there are three exceptions that excuse an untimely filed notice: when the employer has knowledge of the injury, when the employer is not prejudiced by the late filed notice, and when there are exigent circumstances that reasonably excuse the failure to give timely notice. 33 U.S.C. § 933(d) (2002).

Claimant testified that he gave Mr. Black notice of the injury on the day it occurred, and he gave Mr. Black notice that he could not return to work two weeks after the accident because he was obtaining medical treatment for his hand. (Tr. 77-78, 88-89). Mr. Black testified that he approached Claimant following the accident and Claimant related that he had not suffered any injuries. (Tr. II, 36). Although Claimant declined to work two weeks after the accident, Mr. Black testified that he never knew Claimant had suffered an injury until Claimant called him on July 19, 2000, requesting that Mr. Black's insurance carrier pay for his medical bills. (Tr. II, p. 48). Resolving this conflict in testimony is not necessary because I find that even if Claimant gave untimely notice under the Act, such late notice is excused because Employer is not prejudiced by receiving a late notice as set forth more fully below.

A(1) Prejudice Under Section 12(d)(2)

Section 12(d)(2) provides that a failure to give a timely notice is excused when the Employer is not prejudiced by the late notice. 33 U.S.C. § 912(d)(2) (2002). Employer must provide more than conclusory statements that it was prejudiced. *ITO Corp. v. Director, OWCP*, 883 F.2d 422, 424 (5th Cir. 1989). A mere allegation of difficulty is insufficient to establish prejudice, *Williams v. Nicole Enterprises*, 21 BRBS 164, 169 (1988), but actual post-notice investigation is not needed. *Kashuba v. Legion Insurance Co.*, 139 F.3d 1273, 1275 (9th Cir. 1997). Rather, an Employer can show prejudice by proving that it "has been unable to effectively investigate to determine the nature and extent of the alleged illness or to provide medical services. *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 972 (5th Cir. 1978). An employer, however, cannot reasonably expect notice of potential liability until the facts that make the employer potentially liable are ascertained. *ITO Corp.*, 883 F.2d at 424.

In *Kashuba*, 139 F.3d at 1276, the Ninth Circuit overturned an ALJ's decision, as not based on substantial evidence, and determined that the employer was prejudiced by late notice under Section 12(b). The claimant, Kashuba, did not notify his employer "until four months after the alleged injury and nearly six weeks after Kashuba had undergone back surgery." *Id*. The Ninth Circuit reasoned that Kashuba was not a credible witness since the ALJ had cited several inconsistencies in his testimony regarding the alleged injury and its treatment. *Id*. Also, the court reasoned that if the employer had received prompt notification, it could have conducted an "investigation to determine whether the accident had even occurred and its possible relationship to Kashuba's history of back problems, pointing out that Kashuba did not disclose his 1984 spinal injury on his employment application, a fact that would have magnified the need for prompt investigation." *Id*. Late notice deprived the employer from taking part in Kashuba's medical care, avoiding subsequent injuries, and avoiding surgery. *Id*. Furthermore, the employer should have had the opportunity "to get a second opinion before Kashuba underwent surgery or at least been informed before such a major procedure."

Id. Accordingly, the employer was prejudiced because it was deprived from being able to produce "specific and comprehensive" evidence to sever the connection between Kashuba's injury and his employment. *Id*. (citing *Parsons Corp. v. Director OWCP*, 619 F.2d 38, 41 (9th Cir. 1980)).

In *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 689-90 (9th Cir. 1997), the Ninth Circuit held that the employer was not prejudiced by the claimant's, Taylor's, late filed notice. After thirty years as a longshoreman, Taylor filled an EMS accident report on October 15, 1989, reporting an excessive ringing in his ears. *Id*. at 686. At a pre-scheduled doctor's appointment on October 19, 1989, Taylor was diagnosed with "bilateral, descending sensorineural hearing impairment from mild to moderate." *Id*. On June 24, 1991, a second audiogram was conducted reaffirming the earlier results. *Id*. On July 1, 1991, the employer learned for the first time that Taylor's claim was for injuries sustained while at work. *Id*. At a formal hearing, the ALJ ruled that employer was not prejudiced by the late notice. *Id*. Specifically, the ALJ determined that employer still had ample time to conduct discovery and obtain sound surveys. *Id*. at 690. Additionally, the audiograms in the record indicated that Taylor's hearing loss had not worsened or changed in any way that would prevent employer from ascertaining the extent of Taylor's injury. *Id*. This rational was approved by the Ninth Circuit. *Id*.

In this case, Mr. Black, Mr. Roney and Mr. Mauricio all testified that they witnessed the workplace accident of which Claimant complains. (Tr. 18, Tr. II, p. 36, 51-52). Thus, Employer had actual knowledge of the event, and Mr. Black personally asked Claimant if he had been injured in the accident. (Tr. II, p. 36). Mr. Roney, in charge of Clamant's crew, saw Claimant fall, Claimant told him he suffered an injury, and Mr. Roney informed Mr. Black. (Tr. 21-24). Mr. Black witnessed the events, conducted a follow up examination of all his employees and investigated the matter on the same day it happened. Assuming that Claimant did not give Mr. Black notice that he was injured until July 19, 2000, Employer was not prejudiced in participating in Claimant's medical care because Claimant had not underwent any surgery and had received anything other than minor treatment. Employer was not deprived of contesting causation by further medical examination. Accordingly, Employer was not prejudiced by a late notice of injury because Claimant's medical condition had not significantly changed, Claimant had not undergone any surgery, and Employer had already investigated the May 31, 2000 accident on the day it happened.

B. Causation

In establishing a causal connection between the injury and claimant's work, all factual doubts must be resolved in favor of the claimant. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998) (quoting *Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991). Ordinarily the claimant bears the burden of proof as a proponent of a rule or order. 5 U.S.C. 556(d) (2001). By express statute, however, the Act presumes that a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary. 33 U.S.C. § 920(a) (2001). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains

the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. *Director, OWCP v. Greenwich Colleries*, 512 U.S. 267, 281 (1994); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999); 5 U.S.C. 556(d) (2001). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998)(pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995)(pre-existing back injuries); *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979)(compensating the effects of a progressive degenerative condition when that condition was aggravated by conditions at work), *aff'd sub nom.*, *Gardner v. Director*, OWCP, 640 F.2d 1385 (1st Cir. 1981).

B(1) The Section 20(a) Presumption - Establishing a *Prima Facie* Case

Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920(a) (2000). To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. "[T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608, 102 S. Ct. 1312, 71 L. Ed. 2d 495 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983)(stating that a claimant must allege injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990)(finding the mere existence of an injury is insufficient to shift the burden of proof to the employer). To rebut the Section 20(a) presumption, the Employer must present substantial evidence that a claimant's condition is not caused by a work-related accident or that the work-related accident did not aggravate Claimant's underlying condition. *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998). As documented by Dr. Crotwell, Claimant suffered a contusion and bone bruising to his wrist which he traced to a workplace fall on May 30, 2000. (CX 2, p. 2, 7). Claimant established that conditions existed at work that could have caused such an injury because Claimant fell in a witnessed accident after a shed that was attached to a boom line toppled toward Claimant. (Tr. 18, 74-75). Accordingly, Claimant established a *prima facie* case for compensation.

B(2) Rebuttal of the Presumption

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether Employer has succeeded in establishing the lack of a causal nexus. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995)(failing to rebut presumption through medical evidence that claimant suffered an unquantifiable hearing loss prior to his compensation claim against employer for a hearing loss); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144-45 (1990)(finding testimony of a discredited doctor insufficient to rebut the presumption); *Dower v. General Dynamics Corp.*, 14 BRBS 324, 326-28 (1981) (finding a physicians opinion based of a misreading of a medical table insufficient to rebut the presumption). The Fifth Circuit further elaborated:

> To rebut this presumption of causation, the employer was required to present *substantial evidence* that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion-- only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also, Conoco, Inc.*, 194 F.3d at 690 (stating that the hurdle is far lower than a "ruling out" standard); *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983)(stating that the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995)(stating that the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.").

In this case, Employer failed to produce substantial evidence to rebut the presumption. Employer asserted four differed arguments as to why Claimant's injury was not work related. First, Claimant had a bullet fragment in his wrist at the approximate spot Claimant experienced pain from a Vietnam era injury. (Tr. 79-80, Tr. II, p. 26). Claimant testified, however, that he had not suffered any affects from that injury in over twenty-four years. (Tr. II, p. 26). Second, Employer pointed out that Claimant was owing as much as $3,000.00 in back rental payments near the time of his injury, implying that the only reason Claimant filed a claim was to gets some money to pay his bills. (Tr. II, p. 31-32). There is no indication in the record, however, that Claimant's debt problems were any different in July 2000 that at any other time in his life. Claimant had rented the building for his concrete business for nine years and had never faced eviction, and he was habitually late in making payments. (Tr. 34-35, Tr. II, p. 34). Third, Employer asserted that Claimant could have injured his

wrist while working in his concrete business, and Mr. Roney occasionally saw Claimant in his yard following the accident making concrete statutes and fixing "yard stuff" for money. (Tr. 30-31). Such an assertion that Claimant injured his wrist in his concrete statuary business is mere speculation as there is not any objective evidence in the record to support that conclusion. Fourth, Claimant had refused medical treatment within a few hours of his workplace accident stating that he was okay. (Tr. II, p. 36). Claimant testified, however, that it was not until the next morning that his wrist was hurting to such an extent that he sought treatment the emergency room on June 2, 2000. (Tr. 83). I find that all factors taken as a whole, a twenty-four year old bullet fragment in Claimant's wrist, his long standing antecedent debt, work in his shop, and failure to accept medical treatment on the day of the injury, do not constitute substantial evidence - the kind of evidence a reasonable mind might accept as adequate to support a conclusion - that Claimant's wrist injury was not work related.[2]

C. Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a Claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage, 33 U.S.C. § 910(d)(1). *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821 (5th Cir. 1991). Consequently, the initial determination I must make is under which of the alternatives to proceed.

C(1) Section 10(a)

Section 10(a), which focuses on the actual wages earned by the injured worker, is applicable if the Claimant has "worked in the same employment . . . whether for the same or another employer, during substantially the whole year immediately preceding his injury". 33 U.S.C. § 910(a). *Empire United Stevedores*, 936 F.2d at 821; *Duncan v. Washington Metro. Area Transit Authority*, 24 BRBS 133, 135-36 (1990). Here, Claimant only worked for Employer on three separate occasions over approximately one month, and this time frame cannot be characterized as substantially the whole of the year making a Section 10(a) calculation inappropriate.

C(2) Section 10(b)

[2] Even if Employer could rebut the presumption, Claimant could establish by a preponderance of the evidence that he suffered an injury at work and that condition existed at work that could have caused or aggravated his wrist injury. Claimant, Mr. Roney, Mr. Mauricio and Mr. Black all stated that an event occurred at work in which Claimant may have been injured, and Dr. Crotwell affirmatively linked claimants' physical injury to conditions at work. Employer offered no medical evidence to sever this causal connection.

Where Section 10(a) is inapplicable, the courts have found that application of Section 10(b) must be explored prior to the application of Section 10(c). *Palacios v. Campbell Indus.*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), *rev'g* 8 BRBS 692 (1978). Section 10(b) applies to an injured employee who was working in permanent or continuous employment at the time of injury, but did not work "substantially the whole year" prior to his injury within the meaning of Section 10(a). *Empire United Stevedores*, 936 F.2d at 821; *Duncan*, 24 BRBS at 153; *Lozupone*, 12 BRBS at 153. Section 10(b) uses the wages of other workers in the same employment situation as the injured party and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole year preceding the injury, in the same or similar employment, in the same or neighboring place. 33 U.S.C. § 910(b). However, where the wages of the comparable employee do not fairly represent the wage earning capacity of the injured claimant, Section 10(b) should not be applied. *Palacios*, 633 F.2d at 842; *Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990), *vac'd in part on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991); *Lozupone*, 12 BRBS at 153.

Here, two other employees of Employer testified at trial concerning their wages. Mr. Roney, a crew supervisor, testified that he earned $40.00 an hour or $40.00 a ship, unless it was a "shift," meaning that he would tie and untie a boat, in which case he was paid $60.00. (Tr. 15). As a crew supervisor, Mr. Roney's rate of pay was higher than Claimant's and no evidence was introduced to show how many time Mr. Roney had worked during the pervious year.

Mr. Black testified that the majority of ships he moved only required the labor of two people, thus, he would only have to choose one other laborer, and of those times, he called Mr. Mauricio to help approximately three to five times per month. (Tr. II, p. 44, 58). Mr. Mauricio was a three or four year employee of Mr. Black and no evidence was introduced on Mr. Mauricio's rate of pay or if the work available to him was comparable to the work available to an entry level employee without much experience. (Tr. II, p. 58). Mr. Black also testified that some months were busy and others slow so that some months he would move ten ships and others only three. (Tr. II, p. 41). Mr. Black testified that he only called Claimant three times in a two month period. (Tr. II, p. 17-18). Claimant's payroll record, however, reflects that he earned three pay checks in three weeks. Based on the record, I find that making a Section 10(b) calculation is not appropriate based on the wages of Mr. Roney and Mr. Mauricio because both were senior employees, there is no indication that they were working at the same rate of pay, and their payroll records were not entered into evidence.

C(3) Section 10(c)

If neither of the previously discussed sections can be applied "reasonably and fairly", then determination of Claimant's average annual earnings pursuant to Section 10(c) is appropriate. *Gatlin*, 936 F.2d at 821; *Walker v. Washington Metro. Area Transit Authority*, 793 F.2d 319 (D.C. Cir. 1986); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218 (1991). Section 910(c) provides:

> [S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c).

The judge has broad discretion in determining the annual earning capacity under Section 10(c), *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 105 (1991), *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991), keeping in mind that the prime objective of Section 10(c) is to "arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury." *Cummins v. Todd Shipyards*, BRBS 283, 285 (1980). In this context, earning capacity is the amount of earnings a claimant would have had the potential and opportunity to earn absent the injury. *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980); *Walker v. Washington Metro. Area Transit Authority*, 793 F.2d 319 (D.C. Cir. 1986).

When making the calculation of Claimant's annual earning capacity under Section 10(c), the amount actually earned by Claimant is not controlling. *National Steel & Shipbuilding v. Bonner*, 600 F.2d 1288 (1979), *aff'g in relevant part*, 5 BRBS 290 (1977). Therefore, the amount Claimant actually earned in the year prior to his accident is a factor, but is not the over-riding concern, in calculating wages under Section 10(c). *Gatlin*, 936 F.2d at 823. The Board will affirm a determination of average weekly wage under Section 10(c) if the amount represents a reasonable estimate of Claimant's earning capacity at the time of the injury. *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982).

Claimant did not introduce any evidence concerning the amount of money he earned in self-employment. Mr. Roney, a crew supervisor, testified that he earned $40.00 an hour or $40.00 a ship, unless it was a "shift," meaning that he would tie and untie a boat, in which case he was paid $60.00. (Tr. 15). Mr. Black testified that he paid his employees $7.25 and hour at entry level, but guaranteed a payment indicative of fours hour of work regardless of how long a job took. (Tr. II, p. 43). On average, Mr. Mauricio testified that he assisted Mr. Black to move ships approximately three to five times per month. (Tr. II, p. 58). Mr. Black only called Claimant three times in a two month period. (Tr. II, p. 17-18). Claimant's actual earnings during his three days of employment were: May 17, 2000, ($30.00), May 24, 2000, ($30.00), and June 1, 2000, ($100.00)(issued for work performed on May 31, 2000).

Based on the fact that Mr. Black called Claimant to work three times during the month of

May, 2000, Mr. Blacks testimony that he moved an average of five to six ships a month, and Mr. Mauricio's testimony that he helped Mr. Black move three to five ships a month, and considering the fact that Mr. Black moved may ships by himself with the help of one other person, I find that the fairest approximation of Claimant average weekly wage is ascertained by his actual earnings during May 2000. Accordingly, Claimant earned $160.00 during May and multiplying this figure by 12 represents an average annual earnings of $1,920.00, which divided by 52 weeks represents an average weekly wage of $36.92. 33 U.S.C. § 910(d) (2002).

D. Nature and Extent of Injury and Date of Maximum Medical Improvement .

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

D(1) Nature of Claimant's Injury

Claimant presented to Alabama Orthopedic Clinics, P.C., to see Dr. Crotwell on June 6, 2000, regarding a right hand injury incurred through a fall on May 31, 2000 at Alabama State Docks. (CX 2, p. 2). Claimant told Dr. Crotwell that he suffered pain around his thumb, and Dr. Crotwell noticed some swelling, but the pain was not radiating. *Id*. at 3. An x-ray revealed a bullet fragment in his right wrist and a questionable area in the radial styloid. *Id*. Dr. Crotwell assessment was a contusion to the right wrist. *Id*. at 3.

Claimant returned on June 16, 2000, and Dr. Crotwell upgraded Claimant's injury to a severe contusion based on Claimant's reports of continued pain. (CX 2, p. 4). On August 8, 2000, Dr. Crotwell noted that Claimant had a full range of motion in his wrist, but still suffered from some pain. *Id*. at 5. Dr. Crotwell took another set of x-rays that were unremarkable apart from some arthritic changes. *Id*. On August 31, 2000, Dr. Crotwell released Claimant from his care, but on August 16, 2000, Claimant called requesting an MRI of his wrist because he was continuing to experience pain. *Id*. The MRI, dated October 6, 2000, revealed evidence of a bone contusion that should be watched for development of avascular necrosis, and evidence of mild or early osteoarthritis at the 1st and 5th carpal-metacarpal articulations. *Id*. at 6. Reviewing the results of the MRI, Dr. Crotwell opined that in addition to a contusion, Claimant had bone bruising of the trapezium. *Id*. at 7. A subsequent MRI and further x-rays did not reveal any changes other than the fact that a February 2001 MRI revealed a resolving contusion with osteoarthritis. *Id*. at 7, 9. Most of Claimant's continuing problems stemmed from arthritis. *Id*. at 10. Accordingly the nature of Claimant's workplace injury was a severe contusion with bone bruising.

D(2) Extent of Claimant's Disability

On June 6, 2000, Dr. Crotwell fitted Claimant with a wrist splint, and assigned light duty work restricting Claimant's lifting to more than two or three pounds, and restricting the movement of the right had to avoid any twisting or torquing. (CX 2, p. 3). Claimant returned on June 16, 2000, and noting Claimant's reports of pain, Dr. Crotwell did not release Claimant to return to work. *Id*. at 4. On July 11, 2000, Claimant related that he was seventy-five percent improved with only a little pain at the base of his thumb. *Id*. Dr. Crotwell did not want Claimant to resume any heavy work at the docks until July 24, 2000, and he counseled Claimant on how to wean himself from his wrist brace over the next week. *Id*.

On August 8, 2000, Dr. Crotwell noted that Claimant had returned to heavy work at the docks on July 24, and Claimant had a full range of motion, but still had some pain at the base of his wrist. (CX 2, p. 5). On August 31, 2000, Dr. Crotwell released Claimant from his care, but on August 16, 2000, Claimant called requesting an MRI of his wrist because he was continuing to experience pain. *Id*.

Reviewing the results of the MRI, Dr. Crotwell opined that Claimant should restrict himself to light duty work and Claimant should refrain from working with his wrist. (CX 2, p. 7). On February 9, 2001, Dr. Crotwell's plan was merely to keep Claimant on his medications, keep him on light duty, and Claimant was to return only on a per needed basis. *Id*. at 10. Most of Claimant's problem stemmed from arthritis. *Id*. On October 23, 2001, Claimant returned to see Dr. Crotwell regarding tennis elbow and severe arthritis secondary to Claimant's contusion. (CX 2, p. 11). By December 13, 2001, Claimant was performing a lot of heavy work, and Dr. Crotwell released him again to come back only an a per needed basis. *Id*.

D(3) Date of Maximum Medical Improvement

I find that Claimant reached MMI in regards to his right wrist on December 7, 2000. Dr. Crotwell had released Claimant to return to full duty at the docks on July 24, 2000, but that was before Dr. Crotwell knew that Claimant had bone bruising related to his injury. (CX 2, p. 4). Releasing Claimant on July 24, 2001, and again on August 31, 2000, was premature as indicated by Claimant's reports of pain and his desire to obtain an MRI on October 16, 2000. (CX 2, p. 5). The MRI revealed bone bruising, a condition Dr. Crotwell had not detected earlier, a condition which required a close watch, and Dr. Crotwell instructed Claimant work on lighter activity, not to do much work with his wrist, and to "take it real easy." *Id*. at 7. On December 7, 2000, Dr. Crotwell noted that Claimant's range of motion had improved, he had less pain and his plan was only to observe until a repeat MRI demonstrated that Claimant was okay, and if so, then there was nothing else for Dr. Crotwell to do. *Id*. at 7. When Claimant's February 6, 2001 MRI did not show any changes and Dr. Crotwell stated that a lot of Claimant's problems concerned his arthritic condition. *Id*. at 10. Dr. Crotwell did not plan any further treatment for Claimant. Accordingly, Claimant's date of maximum medical improvement is December 7, 2000 because by that date Claimant's bone bruise had resolved in that it was no longer producing significant pain, Claimant's contusion was fully healed, and after that date Dr. Crotwell did not undertake any further treatment with a view toward improvement.

E. Prima Facie Case of Total Disability and Suitable Alternative Employment

E(1) Prima Facie Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a prima facie case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 156 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

In this case, there is no dispute that Claimant could not perform his former longshore employment as a rope man for Employer from the date of the accident to July 24, 2000, the date Dr. Crotwell first released Claimant to heavy duty. (CX 2, p. 4). That release to full duty was premature, however, because Dr. Crotwell was unaware of an underlying bone bruise that was not

demonstrated until an October 16, 2000 MRI, after which Dr. Crotwell instructed Claimant to "take it real easy." *Id*. at 7. After reaching maximum medical improvement on December 7, 2000, Dr. Crotwell continued his restriction of "light duty." *Id*. at 10. In a December 2001, visit however, Dr. Crotwell noted that Claimant was exceeding his "light duty" restrictions and engaging in a lot of "heavier work." *Id*, at 12.

After recovering from his workplace accident, Claimant testified that he resumed his concrete statuary self-employment. Claimant described the work as constructing "ornamental concrete birdbaths, or fountains, flowerpots, you know, out of concrete, which is heavy material." (Tr. 80). I note that under the Dictionary of Occupational Titles, concrete work is classified as "heavy work," meaning that the worker is: "Exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects." DICTIONARY OF OCCUPATIONAL TITLES 579.665-014, Appendix C (4th ed. 1991). Employer made no showing that its work was classified as heavy work or below, indeed the Dictionary of Occupational Titles classified a dock hand helper as engaging in very heavy work, meaning that a worker is required to exert "in excess of 100 pounds of force occasionally, and/or in excess of 50 pounds of force frequently, and/or in excess of 20 pounds of force constantly to move objects." *Id*. at 911.687-010 & Appendix C.

Finding that Claimant's job with Employer constituted very heavy work is supported by the record. Claimant testified that Mr. Black only offered him a job after Claimant helped Mr. Black hang an outboard motor on the back of a boat. (Tr. 70). Claimant had on a sleeveless shirt, Mr. Black made a couple of comments and told Mr. Roney that Claimant would make a good rope man. (Tr. 70-71). Additionally, Claimant was injured attempting to pull a boom to shore that required so much exertion that a boat had to be used to move it. (Tr. 18). Accordingly, I find that Claimant cannot resume his former longshore employment because I find that it exceeds the light work restrictions imposed by Dr. Crotwell, and exceeds the level of heavy work Claimant voluntarily engaged in while performing his concrete business.

E(2) Suitable Alternative Employment

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991); *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996); *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). Here, Employer did not produce any evidence of suitable alternative employment.

E(3) Claimant's Voluntary Employment - Suitable Alternative Employment and Credit

for Wages Earned

The Act contains specific offset and credit provisions which prevent employees from receiving a double recovery for the same injury, disability, or death. *See* 33 U.S.C. §§§ 903(e), 914(j), 933(f) (2002). In addition, an independent credit doctrine exists in case law which provides employer with a credit for prior disability payments under certain circumstances to avoid a double recovery of compensation for the same disability. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir.1986); *Adams v. Parr Richmond Terminal Co.*, 2 BRBS 303 (1975). The Act does not contain any specific credit provision[3] entitling an employer to offset sums a claimant earned from another employer. *Carter v. General Elevator Co.*, 14 BRBS 90, 98 n.1 (1981). Rather, instead of awarding a credit, "the proper procedure is for the administrative law judge to award temporary total disability benefits from the time claimant did not work, punctuated by temporary partial awards for the time claimant was engaged in part-time employment." *Id*. at 98; *Turk v. Eastern Shore Railroad*, 33 BRBS 468 (1999)(ALJ)(same).

"An award of total disability while a claimant is working is the exception and not the rule." *Carter*. 14 BRBS at 97. *See also Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); *Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986). Thus, claimants working in pain or in sheltered employment may still receive total disability even though they continue to work. *See Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (sheltered employment); *Shoemaker v. Schiavone & Sons Inc.*, 11 BRBS 33, 37 (1979)(extraordinary effort); *Walker v. Pacific Architects & Engineers*, 1 BRBS 145, 147-48 (1974)(beneficent employer). Also, the employer bears the burden of showing suitable alternative employment after the claimant establishes a *prima facie* case of total disability. *Turner*, 661 F.2d at 1042-43; *Carter*, 14 BRBS at 97. Therefore, for an employer to take advantage of the *Carter* rule, a claimant's voluntary employment must be such that it does not constitute sheltered employment or extraordinary effort, and must be suitable alternative employment as established by the employer.

Here, at some unspecified time, Claimant resumed his self-employment constructing concrete statuary. Dr. Crotwell released Claimant to return to full duty on July 24, 2000, and on August 31,

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[3] Related to the credit provisions under the Act and voluntary employment by a claimant is Section 8(j), which permits an employer to request a claimant to report his post-injury earnings against the penalty of forfeiture of compensation for under-reporting or failing to report. 33 U.S.C. § 908(j) (2001). To invoke that provision, however, the employer must first require that the former employee file such a report. 33 U.S.C. § 908(j)(1-2) (2001); *Hundley v. Newport News Shipbuilding and Dry Dock Co.*, 1998 WL 850137, *5 (DOL BenRev. Bd. 1998)(stating that both the Senate bill and the House amendment to Section 8(j) contemplated that employers would have authority "to require employees receiving compensation to submit a statement of earnings not more frequently than semi-annually."). Here, the Employer never submitted to Claimant an LS-200, Report of Earnings Form, to invoke the forfeiture provisions of Section 8(j).

2000, but Claimant reported significant pain, necessitating a further MRI that revealed bone bruising. (CX 2, p. 5-7). I find that Claimant's work during this time period constitutes "working in pain" or "extraordinary effort" which cannot form the basis of establishing suitable alternative employment and find it appropriate to disregard the work Claimant performed during this time period as he was operating under the mistaken assumption of Dr. Crotwell that he did not suffer from a bone bruise.

No evidence was presented by any party to show Claimant's actual post-injury earnings. Under Section 8(j) of the Act, Employer may request Claimant's post-injury earnings, show that Claimant's disability is partial, or show that Claimant has not suffered any loss of wage earning capacity.

F. Medical Authorization

In general an employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. *Bulone v. Universal Terminal and Stevedore Corp.*, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. *Tough v. General Dynamics Corporation*, 22 BRBS 356 (1989); *Gilliam v. The Western Union Telegraph Co.*, 8 BRBS 278 (1978).

In *Shahady v. Atlas Title & Marble*, 13 BRBS 1007 (1981), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. *Banks v. Bath Iron Works Corp.*, 22 BRBS 301, 307, 308 (1989); *Jackson v. Ingalls Shipbuilding Division, Litto Systems, Inc.*, 15 BRBS 299(1983); *Beynum v. Washington Metropolitan Area Transit Authority*, 14 BRBS 956 (1982). Under Section 7(d)(1), an injured employee cannot receive reimbursement for medical expenses which he provided payment unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency, refusal, or neglect. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982) *rev'g* 13 BRBS 1007 (1981); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983). The burden of proof regarding compliance with this requirement is on the employee. *Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 407, 10 BRBS 1, 8 (4th Cir. 1979), *rev'g* 6 BRBS 550 (1977).

Pursuant to Section 7(c)(2) of the Act an employer must authorize medical treatment by a claimant's physician of choice. However, once a claimant has made his initial, free choice of physician, he may change physicians only upon obtaining prior written approval of the employer, carrier, or deputy commissioner. 33 U.S.C. § 907(c)(2); 20 C.F.R. § 702.406. A claimant's right to an initial free choice of physician pursuant to Section 7(b) does not negate the prior request requirement. *Beynum v. Washington Metro. Area Transit Auth.*, 14 BRBS 956 (1982); *Betz v. Arthur Snowden Co.*, 14 BRBS 805 (1981). The employer will ordinarily not be responsible for the payment of medical benefits if the claimant fails to obtain the required authorization. *Slattery Assocs. v. Lloyd*, 725 F.2d 780, 787 (D.C. Cir. 1984); *Swain v. Bath Iron Works Corp.*, 14 BRBS 657, 664 (1982).

In this case, Claimant sought emergency treatment from Springhill Memorial Hospital on June 2, 2000, following his workplace accident on May 31, 2000. (CX 1, p. 2). Claimant never expressed any reason why he did tell Employer of his injury between May 31, 2000 and June 2, 2000, even though he testified that he wrist was hurting the morning after the accident. (Tr. 82). Likewise, Claimant did not inform Employer of his appointment with Dr. Crotwell. I find that Claimant failed to meet his burden under Section 7(d)(1) because there was an intervening full day that Claimant was in pain negating the exception of emergency, and Claimant never gave Employer the opportunity to refuse or neglect treatment at Springhill Memorial Hospital, or for his initial treatment with Dr. Crotwell.

Although Claimant testified that he told Employer that he hurt his hand about two weeks after the accident and was under the care of a physician, Claimant never requested any medical treatment from Employer until July 19, 2000, when Claimant unequivocally told Employer that he was hurt and needed medical care from Employer's carrier. (Tr. 89-90; Tr. II, p. 48). Employer neglected to provide any medical care after that date, and Employer is liable for all of Claimant's out of pocket expenses after July 19, 2000 under Section 7(a) of the Act.

Claimant submitted the following expenses:

DePuy Orthotech	$40.00
Springhill Memorial Hospital	$439.30 (paid by private insurance)
dj Orthopedics, L.L.C.	$49.00
Walgreens Pharmacy	$10.00
Rite Aid Pharmacy	$768.79 ($518.02 paid by private insurance)
Alabama Orthopaedic Clinics, P.C.	$3,156.00 ($2,916.00 paid by private insurance)

(CX 3-8).

The Board has upheld cases allowing a claimant only reimbursement of out-of-pocket medical expenses when a third party insurer pays for the claimant's medical bills. *Nooner v. National Steel and Shipbuilding Co.*, 19 BRBS 43 (1986) (stating that an employee may recover only the amounts that he expended under Section 7 and indicating that the non-occupational carrier may intervene under the Act and recover amounts mistakenly paid).

The $40.00 bill from DePuy Orthotech was incurred on June 12, 2000, and is not compensable. Likewise, Claimant's bill from Springhill Memorial Hospital was incurred on June 2, 2000, prior to Employer's obligation to pay for medical expenses. The bill from dj Orthopedics was incurred on February 5, 2002, and is compensable. Prescriptions filled at Walgreens Pharmacy were incurred in April and May 2001, and are compensable. Some prescriptions filled at Rite Aid were incurred prior to July 19, 2000, and only $195.77 of out-of-pocket expenses were incurred after that date. $873.00 was incurred at Alabama Orthopaedic Clinic prior to July 19, 2000, and the total amount paid in by Claimant in the year 2000 ($160.00), cannot be fairly apportioned based on the evidence in the record. Likewise, Claimant treated with Dr. Crotwell in 2001 for tennis elbow, a condition that neither Claimant nor Dr. Crotwell causally to his workplace accident, and the total amount Claimant paid for treatment in 2001 ($80.00) cannot be fairly apportioned between his work and non-work related injuries. Accordingly I find it inappropriate at this time to award reimbursement for out-of-pocket medical expenses incurred for treatment with Dr. Crotwell. Failing an agreement between the parties, Claimant may file a motion for reconsideration. to affirmatively link his medical expenditures to his work related injury. *See* 20 C.F.R. § 802.206(b) (2001) (relating that a motion for reconsideration is timely if filed no later than ten days from the date the decision or order was filed in the office of the deputy commissioner). Accordingly, Claimant is entitled to medical reimbursement of $254.77 representing his out-of-pocket medical expenses.

G. Conclusion

Claimant's notice to Employer that he suffered a workplace injury is timely under the Act, and Claimant established that his wrist injury was causally related to his employment. Claimant's average weekly wage under Section 10(c), as reflected by his actual earnings, was $36.92 per week. Claimant reached maximum medical improvement on December 7, 2000, and was unable to return to his former longshore work based on the restrictions of Dr. Crotwell, and based on the level of exertion Claimant was performing in his self-employment. Employer did not demonstrate any suitable alternative employment. Employer did establish that Claimant continued to engage in self-employment, but failed to produce evidence of the value of that self-employment to show that Claimant had not suffered an economic disability. Because Claimant did not request medical treatment from Employer until July 19, 2000, Employer is not liable for medical expenses incurred prior to that date, but is liable for medical expenses incurred afterwards under Section 7(a) due to it neglect/refusal to provide treatment.

H. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986

(4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

I. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) & 906(b)(2) of the Act for the period from June 1, 2000 to December 7, 2000 based on an average weekly wage of $36.92 per week with a corresponding compensation rate of $36.92.

2. Employer shall pay to Claimant permanent total disability compensation pursuant to Section 908(c)(21) & 906(b)(2) of the Act based on an average weekly wage of $36.92 per week from December 8, 2000, and continuing, with a corresponding compensation rate of $36.92.

3. Employer shall reimburse Claimant for $254.77 in medical expenses incurred after July 19, 2000.

4. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

5. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

6. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

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CLEMENT J. KENNINGTON
Administrative Law Judge